



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

SUIT NO. 111 OF 2018

KENYA NATIONAL UNION OF NURSES.....CLAIMANT/APPLICANT

VERSUS

MURANG'A COUNTY SERVICE PUBLIC BOARD....1<sup>ST</sup> RESPONDENT

THE GOVERNOR, MURANG'A COUNTY GOVT.....2<sup>ND</sup> RESPONDENT

RULING

1. The Claimant/Applicant seeks relief against the Respondents for the non-payment of 5 months salary arrears. The notice of motion dated 14<sup>th</sup> March 2018 was filed on 15<sup>th</sup> March 2018 under certificate of urgency alongside the memorandum of claim, supporting affidavit and documents in support. The Claimant/Applicant asserts that the Respondents have declined to implement the decision of the Council of Governors made after a nationwide nurses strike.

2. The Respondents were opposed and filed grounds in opposition on 19<sup>th</sup> April 2018. The grounds were in brief that the Claimant/Applicant's members had participated in a strike that was declared unprotected by the court and they did not attend duty during the time of the strike. The Respondents assert that during the strike people suffered losses and others lost their lives and the applicants were seeking to be paid despite these losses. The Respondent asserts that the letters referred to by the Applicants are not legally binding but persuasive in nature and the Respondents were not persuaded taking into account the people dependent on the Respondents suffered. The Respondent also filed a replying affidavit sworn by Joseph Mbai the Murang'a County cabinet secretary for health. His affidavit repeated the assertions made on the grounds of opposition. He deponed that the council of governors is merely an *ad hoc* formation with no teeth and the directive by the council of governors is not legally binding to the county government.

3. The parties argued the motion on 3<sup>rd</sup> May 2018. Mr. Odongo for the Claimant/Applicant argued that the Applicant sought the payment of arrears that were due after the nationwide strike by nurses, the return to work agreement stipulated that withheld salaries be paid by end November and no later than 31<sup>st</sup> December 2017. He submitted that only Murang'a out of the 47 counties did not pay and that it had no grounds for non-payment.

4. Mr. Muthoni for the Respondents submitted that the Respondents were opposed to the grant of orders as the Claimant/Applicant had sought in the motion what they seek in the claim. He asserted that this motion is at interlocutory stage and the grant of the prayers would dispose of the entire suit.

5. The dispute in the matter is the non-payment of 5 month's salary arrears. The Claimant/Applicant has set out elaborately what transpired after the nationwide strike by nurses and the claim as articulated is the same, in the main, as the interlocutory application. The Claimant/Applicant's notice of motion application dated 14<sup>th</sup> March 2018 and filed the next day seeks the orders that are *mutatis mutandi* as the ones on the claim. The orders sought are in the nature of a mandatory injunction and are final in nature. In considering whether to grant a mandatory injunction the threshold for the grant of mandatory injunctions is well set out in precedent. The considerations for granting interlocutory mandatory injunctions were well stated in the case of **Robai Kadili Agufa & Another v Kenya Power & Lighting Co. Ltd [2015] eKLR** cites the Court of Appeal decision in **Kenya Breweries Ltd & Another v Washington O. Okeyo [2002] eKLR** stated as follows:-

*“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948 which read:-*

*‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”*

6. The matters raised by the Claimant/Applicant and the Respondent are not clear cut and simple. There is contention on one hand that due salaries were not paid while on the other there is a contention that there was no basis for the payment being sought. There is also the question of the directives by the council of governors which is challenged in the Respondent's case.

7. The application is therefore not fit for grant as no special circumstances have been revealed why it should be granted at the onset before the hearing of the claim. Application is thus dismissed with costs to the Respondents.

It is so ordered.

**Dated and delivered at Nyeri this 9<sup>th</sup> day of July 2018**

**Nzioki wa Makau**

**JUDGE**